IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1965

Nos. 69 & 71 (Consolidated)

ROBERT N. HARDIN, Prosecuting Attorney for the Seventh Judicial Circuit of Arkansas, *et al.*,
Appellants,

AND

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*
Appellants,

V.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *et al.*,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF OF AMICUS CURIAE ON BEHALF OF THE STATE OF WASHINGTON IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

The State of Washington is in a position essentially similar to that of the appellant prosecuting attorneys in the controversy presently before the court. Now pending before the United States District

Court for the Western District of Washington is *Chicago, Milwaukee, St. Paul & Pacific Railroad Company, et al. v. Pearson, et al.*, Civil Action No. 6214, by which the several common carrier railroads operating within the state seek to enjoin enforcement of the Washington Full Crew Laws (RCW 81.40. .020, et. seq.). The individual members of the Washington Utilities and Transportation Commission, the Attorney General of the State of Washington, and the prosecuting attorneys for Washington's thirty-nine counties have been named as defendants.

On its own motion, the three judge federal court convened to hear the matter, separated the issues raised by the complaint, and on May 17, 1965 heard argument on the question of preemption of the full crew laws by the adoption of Public Law 88-108. As yet no decision has been filed. It is clear, however, that the decision of this court on the preemption issue with respect to the Arkansas statutes will be dispositive of the same issue insofar as Washington law is concerned.

It is the position of the State of Washington that there is nothing in Public Law 88-108 by which the Congress of the United States has indicated an express or implied intent to have that law supersede state full crew laws; the legislative history of Public Law 88-108 militates against such a determination; and there is no inherent conflict between Public Law 88-108 and its progeny and the Washington full crew law which would justify a holding of preemption.

SUMMARY OF ARGUMENT

This case presents the issue of whether the adoption of Public Law 88-108 has the effect of superseding state full crew laws prescribing the crew consist of freight trains. In order to determine this issue, it is necessary to examine the intent of Congress in enacting the law in question, both in terms of the language employed in the act, and in the pertinent legislative history. Since Public Law 88-108 created an arbitration board and directed the attention of the board to certain issues in a labor dispute, it is also necessary to examine the action of the board to determine its concept of its own powers. Finally, because one of the several criteria of preemption is conflict between state and federal law, it is essential that the conflict question be explored fully.

I.

Public Law 88-108 was enacted by Congress in an effort to find some basis for settlement of a lengthy *labor* dispute. It arose from the filing of certain notices by rail carriers and railroad brotherhoods as to their intentions with respect to operating rules and regulations relative to the manning of freight trains.

The arbitration board created pursuant to this law was temporary in character and was confined to a determination of the issues raised only in these notices, which could not have the effect themselves

of superseding state law to the contrary. The award was to be binding only upon the carrier and organization parties to the dispute. Operations by rail carriers within states having full train crew laws were not within the issues framed by the law, and these states were certainly not parties to the dispute to which congressional attention was directed. Therefore, by no express or necessarily implied language is there any intention of Congress to affect state full crew laws.

II.

It has long been held by this court that in the absence of a clearly expressed purpose so to do, Congress will not be held to have intended to prevent or supersede the exertion of state police powers in matters of health, safety and welfare, *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249 (1931), *Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942), *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943). No such expression of intent is to be found in Public Law 88-108. Similarly, this court in deciding preemption issues, has distinguished those cases involving matters of safety, health and welfare from those cases in which these traditional state powers have not been at issue. Public Law 88-108 does not reflect the establishment of a single and all-embracing regulatory scheme or the pervasive assertion of federal jurisdiction over the subject matter of train

manning so as to indicate preemptive intent. Many cases relied upon by the Arkansas District Court in this case have been expressly distinguished by this court on that basis. *Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942).

III.

The pertinent legislative history of Public Law 88-108 reveals a specific disclaimer on the part of Congress that it intends preemption of state law to result. Senate Committee Report No. 459 describes the act as a "one-shot" effort to reach "settlement" of a "labor dispute" between "carriers" and "certain of their employees." The report of the House Committee stated specifically that it was not intended that any awards supersede or modify any state law relating to the manning of trains.

In their testimony before the United States Senate, the railroads themselves admitted that the state full crew laws would preclude the discharge of firemen and train crewmen required by such laws.

IV.

The arbitration board created pursuant to Public Law 88-108 recognized the explicit limitations in the act authorizing its existence. It purported to set no national rule or policy on either the trainmen or firemen issues, recognizing that state full crew laws were to be fully effective.

Similarly, the board noted that its powers were

confined to those issues framed by the parties (carriers and organizations), and that the scope of the board actions could not exceed the scope of the action the parties themselves could take had they been able to reach agreement. Since the parties by their own action could not supersede state law, neither could the board under the issues as expressly framed by Public Law 88-108.

V.

The Arkansas Court conceded in its decision that no express or necessarily implied language of preemptive intent could be found in Public Law 88-108. For this reason, the basis for the court's decision is "an actual and apparent conflict" between the congressional enactment and state full crew laws, in spite of the *caveat* in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), which enjoins seeking out conflicts between state and federal regulation where none clearly exists.

The "conflict" issue in the instant case falls with great precision within the framework of *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963). A critical analysis of the majority and minority opinions reveals conclusively that Public Law 88-108 does not create an irreconcilable conflict between this act and state full crew laws. The existence of diverse minima does not create an irreconcilable conflict between state and federal law.

Public Law 88-108 shows no intention to establish a national uniform policy or a pervasive scheme

of federal regulation. The congressional purposes and objectives do not encompass a determination of the proper size or consist of train crews in operations as to which state laws have already spoken. This being so, state full crew laws do not stand as an obstacle to the accomplishment of the purposes and objectives of Congress.

ARGUMENT OF AMICUS CURIAE

I. Public Law 88-108 Does Not Evince an Intent by Congress to Preempt State Full Crew Laws

Public Law 88-108 (77 Stat. 132) was enacted on August 28, 1963 and is codified at 45 U.S.C. Section 157 (1964 Supp.). Section 2 of the act provided for the creation of an arbitration board which was directed to decide questions raised in certain notices served by the railroads and brotherhoods relating to the use of firemen and train crew consists, and to make an award. Section 3 of the act is of greatest significance, and provides in pertinent part as follows:

> "The arbitration board *shall make a decision*, pursuant to the procedures hereinafter set forth, *as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959*, identified as 'Use of Firemen (Helpers) on Other Than Steam Power' and 'Consist of Road and Yard Crews' *and that portion of the organizations' notices of September 7, 1960*, identified as 'Minimum Safe Crew Consist' and implementing proposals pertaining thereto. The arbitration board *shall incorporate in such decision any matters on which it finds the parties were in agreement*, shall *resolve the matters*

> *on which the parties were not in agreement*, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. *Such award shall be binding on both the carrier and organization parties to the dispute* and shall constitute a complete and final disposition *of the aforesaid issues covered by the decision of the board of arbitration.*" (Emphasis supplied)

Thus, the attention of Congress was directed to the resolution of a labor dispute which was brought to a head by the notices served by the carriers that they would put into effect changes in existing work rules. *It was to these notices that all subsequent action, both by Congress and the arbitration board was devoted.* The notices to which the law refers purported to do one thing, i.e. to "eliminate all agreements, rules, regulations, interpretations, and practices, however established * * *" relative to the use of firemen in engine, yard and train service and to other matters of freight crew consist. Obviously, the rail carriers serving such notices have no attributes of sovereignty giving rise to powers transcending the authority of the states. Therefore, these notices were necessarily subject to the police power of the states, and the proposal to eliminate "all agreements, rules, regulations, interpretations, and practices" could relate only to those established previously under collective bargaining, and only in those areas in which no restraints of state full crew laws were in force. It is clear from the express language of Public Law 88-108 and the award in arbitration that this limiting concept prevailed throughout.

It should be beyond cavil that Congress, in the adoption of Public Law 88-108 was doing nothing more than establishing machinery by which an arbitration board of limited power and jurisdiction would undertake to dispose of specific issues raised by specific parties. The title of the Act is "Joint Resolution to provide for the settlement of *the labor dispute* between *certain carriers* by railroad and *certain of their employees.*" The preamble to the law states that the intent is to settle two specific issues raised in the labor dispute "in a manner which preserves and prefers solutions reached through collective bargaining." In the body of the Act, Congress gave only this authority to the arbitration board, the authority to "make a decision * * * as to what disposition shall be made" of the carriers' notices and the organization notices and implementing proposals pertaining thereto. The scope of the board's deliberations was thus limited to issues raised *by* the parties to the dispute. Curiously enough for a national law, especially one now claimed to be a part of the "supreme law of the land", the arbitration board was ordered to "incorporate in such decision any matters on which it finds the parties were in agreement." The law limited the board's existence to a two-year period, absent "agreement otherwise", directed the board to make its award within 90 days, and provided for the expiration of the joint resolution authorizing the existence of the board after 180 days. The award of the board was merely to "constitute a

complete and final disposition of *the aforesaid issues* covered by the *decision* of the board of arbitration."

This law thus reveals three things beyond question. First, it was intended to be temporary. Secondly, it dealt only with two specific issues, i.e. conflicting notices filed by certain carriers and railroad brotherhoods; and thirdly, it was to affect only the parties to the labor dispute which brought about its existence.

Add to this two more incontrovertible facts. One, that the states having full crew laws were not in 1963 and are not now parties to the labor dispute which was before Congress for its consideration and, two, that the notices to which the congressional attention was confined could hardly have the effect of vitiating state law.

II. State Law Is Not Superseded in Absence of Manifest Intent

The issue of preemption of state law under the Supremacy clause is no stranger to this court. Consequently, there has evolved over the years a body of law setting out definite standards which must prevail before congressional supersession of state law will be held to have taken place. When reduced to essentials, the rule may be stated as follows: In the absence of a clearly expressed purpose to so do, Congress will not be held to have intended to prevent or supersede the exertion of state police powers in matters of health, safety and welfare.

A prior decision of the United States Supreme

Court, *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249 (1931) dealt specifically with the question of preemption of state full crew laws by congressional action. In that case, it was contended that the Arkansas full crew law was superseded by adoption of the Railway Labor Act and the 1920 amendments to the Interstate Commerce Act. In disposing of the issue, and upholding the state law, the court said at page 256:

> "In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the states for the regulation of the number of men to be employed in such crews. *Reid v. Colorado*, 187 U.S. 137, 148, 47 L. Ed. 108, 114, 23 S. Ct. 92, 12 Am. Crim. Rep. 506; *Savage v. Jones*, 225 U.S. 501, 533, 56 L. Ed. 1182, 1194, 32 S. Ct. 715; *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611, 71 L. Ed. 432, 438, 47 S. Ct. 207. * * *"

See also the significant case of *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943) wherein this court rejected the contention of the railroads that the Railway Labor Act and others had collectively preempted the field of state safety regulation when their subject matter became an issue in a labor dispute. The court held that a preemptive condition was not created by reason of a labor dispute being subject to mandatory arbitration.

There is a fundamental distinction drawn by the United States Supreme Court in preemption cases between those in which the state law alleged to be

preempted is a police power regulation and those in which it is not.

In *Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942), the court distinguishes several cases in which congressional action has been held to override state law. After reaffirming the rule that congressional intention to exclude states from exerting their police power must be clearly manifested, the court makes the following observation at page 749:

> "* * * Therefore we were more ready to conclude that a federal act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. *Maurer v. Hamilton*, 309 U.S. 598, 84 L. Ed. 969, 60 S. Ct. 726, 135 ALR 1347, *supra*, and cases cited. Here we are dealing with the latter type of problem. We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard."

In *Illinois Central R. Co. v. Public Utilities Commission*, 245 U.S. 493 (1918), the Supreme Court said at page 510:

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution * * * it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested." (Citations omitted)

On the question of congressional preemption, the court said in *H. P. Welch Company v. New Hampshire*, 306 U.S. 79 (1939), at page 85:

> "Its purpose to displace local law must be definitely expressed."

This is the "manifest intent" rule stated time after time by this court. For additional citations to this rule, the court is referred to *Reid v. Colorado*, 187 U.S. 137 (1902); *Chicago, Rock Island & Pacific Railroad Company v. Arkansas*, 219 U.S. 453 (1911); *Atlantic Coast Line Railroad Company v. Georgia*, 234 U.S. 280 (1914); *Maurer v. Hamilton*, 309 U.S. 598 (1940); *Southern Pacific Railroad Company v. Arizona*, 325 U.S. 761 (1945); and *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218 (1947).

It has been further held that the mere simultaneous occupation of a field of commerce by both State and Federal governments does not afford grounds for preemption *DeVeau v. Braisted*, 363 U.S. 144 (1960), and that state law which does not frustrate the federal purpose is not preempted despite simultaneity of application. *Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.*, 372 U.S. 714 (1963). While preemption may occur where there is an inherent conflict in the terms or policies of federal vis-a-vis state legislation, we point out the *caveat* in *Huron Portland Cement Company v. Detroit*, 362 U.S. 440 (1960), wherein the court says at page 446:

> "We conclude that there is no overlap be-

> tween the scope of the federal ship inspection laws and that of the municipal ordinance here involved. For this reason we cannot find that the federal inspection legislation has pre-empted local action. To hold otherwise would be to ignore the teaching of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists. * * *"

It is notable that the Arkansas court, in arriving at its decision, placed great reliance on such cases as *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), *California v. Taylor*, 353 U.S. 553 (1957), *Cloverleaf Co. v. Patterson*, 315 U.S. 148 (1942), and *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283 (1959). It must be noted that these (and other cases relied upon by the court) either did not relate to questions of health, safety or welfare, or alternatively represented holdings that the scheme of federal regulation was so pervasive as to preclude state action.

This court specifically observed in *Teamsters Local 24 v. Oliver*, 358 U.S. 283, 297:

> "We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce."

We note further that the basis for the court's decision in *Pennsylvania v. Nelson, supra*, was the prior decision in *Hines v. Davidowitz*, 312 U.S. 52 (1941). The latter case, and *Cloverleaf Co. v. Pat-*

terson, supra, were expressly distinguished in *Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Board,* 315 U.S. 740 (1942). At pages 749-750, the court states:

> "Furthermore, in the *Hines* Case the federal system of alien registration was a 'single integrated and all-embracing' one * * * Here, as we have seen, Congress designedly left open an area for state control. Nor can we say that the control which Congress has asserted over the subject matter of labor disputes is so pervasive (Cf. *Cloverleaf Butter Co. v. Patterson,* * * *) as to prevent Wisconsin under the familiar rule of *Pennsylvania R. Co. v. Public Service Commission,* 250 U.S. 566, 569, 63 L. Ed. 1142, 1145, 40 S. Ct. 36, PUR 1920A 909, from supplementing federal regulation in the manner of this order * * *"

Public Law 88-108 reflects no "single and all-embracing system" such as was held to exist in *Hines v. Davidowitz,* 312 U.S. 52 (1941) and later on in *Pennsylvania v. Nelson,* 350 U.S. 497 (1956). The statute reflects no pervasive assertion of federal jurisdiction over the subject matter such as the court found in *Cloverleaf Co. v. Patterson,* 315 U.S. 148, (1942). We are thus left with the plain fact that the Arkansas court ignored the very explicit language of those cases we have cited herein in which the principle of supersession has been rejected by this court when traditional state police powers were at issue, in the absence of a manifest congressional intent that such be the result.

Not only is the absence of an express or necessarily implied (or manifest) intent to preempt state

full crew laws evident from the act itself, this point is conceded by the United States District Court of Arkansas in the case here under review. It is important to note the above concession. The majority of the court states (239 F. Supp. 1 at page 20):

> "In the instant action, although the enabling legislation itself might be said to contain no language which manifests a congressional intent that the proposed Arbitration Board and the award made pursuant to the authority and direction of the statute preempted or occupied the field, the fundamental consideration is its implementation and its practical application * * *"

In view of the final decision of the court, if there had been any possible way to find express or implied legislative intent to preempt state full crew laws, the court surely would have done so. However, conceding that there was none, the court felt compelled to construct an "actual and apparent conflict" between Public Law 88-108 and the Arkansas full crew law with which it was dealing. We will demonstrate hereafter that the court erred in this regard.

The Arkansas court applied a presumption that acts of Congress are intended to apply uniformly. From this it reasoned that because Congress did not expressly state that operations subject to full crew laws were excluded, they must have been intended to be included, and on this basis holds preemption. Such a conclusion runs counter not only to the legislative history of Public Law 88-108, but also is contrary to the long and honored line of U. S. Supreme Court cases set out heretofore.

III. The Legislative History of Public Law 88-108 Militates Against a Finding of Preemption

It has been demonstrated that nowhere in the language of the act itself can there be found a specific and express intention on the part of Congress to preempt state full crew laws. Nor will the suggestion that such intent may be fairly implied from the legislative history stand the light of day. Indeed, the history of this law reveals a contrary intention, and even the railroads conceded at the time that preemption would not occur.

Senate Report No. 459, which submitted Senate Joint Resolution No. 102 for congressional action reads in part as follows:

> "The joint resolution reported by the committee is designed to resolve the current dispute. That is, the dispute engendered by the filing by certain carriers of notices on November 2, 1959, and the filing by the operating brotherhoods of notices of September 7, 1960. This proposal is not and cannot conceivably be considered as a precedent for the railroad industry, the transportation industry generally, or for any other labor-management dispute. It is what it purports to be—a one-shot solution through legislative means to a situation which imperiled beyond question the economy and security of the entire Nation." *U.S. Code, Congressional and Administrative News, 88th Congress, 1st Session, 1963*, p. 837.

No less revealing of the intent of Congress was the manner in which the House of Representatives' counterpart of the bill was reported out of commit-

tee. At page 14 of House Report No. 713, it is expressly stated:

> "The Committee does not intend that any award made under this Section may supersede or modify any state law relating to the manning of trains."

What more could Congress do to disclaim preemption? The law it passed contained no express preemptive language. The authoritative legislative history describes the act as a "one-shot" effort to reach "settlement" of a "labor dispute" between "carriers" and "certain of their employees." The Senate Committee expressed a desire to avoid the "obvious dangers of repeated congressional intervention" into labor-management disputes and further imposed a distinct expiration date to "closely limit the scope and impact of the resolution" in the event no mutual agreement could be reached by the parties. The position of the House Committee report was restated by the chairman of the House Committee on Interstate and Foreign Commerce, in the course of debate. (Congressional Record, Vol. 109, Part 12, P. 16122).

A corollary to the "manifest intent" rule is the rule that state public safety and health regulations will not be superseded when Congress demonstrates any "hesitancy." *Maurer v. Hamilton*, 309 U.S. 598 (1940). In the instant case, a great deal more than mere hesitancy has been shown. There is specific disclaimer of intent to preempt. The

statutory purpose was clearly not the displacement of state full crew laws.

At the time of passage of Public Law 88-108 no one—not even the railroads—contended that its adoption would have a preemptive effect. This is shown by a document entitled "Supplemental Rebuttal Statement for the Carriers in the Matter of a Dispute Between Certain Rail Carriers and Five Railway Labor Organizations Involving Rules and Practices Governing the Use, Compensation, and Assignments of Railroad Operating Employees." The particular document may be found in *Hearings before the Committee on Commerce, United States Senate, 88th Congress, First Session, on S. J. Res. 102*, at page 707. It was a statement by the carriers to the effect that even with the adoption by Congress of Senate Joint Resolution 102 in its original form, the carriers could not discharge 25.9% of the firemen in the full crew law states and 50% of the "unneeded trainmen and switchmen" because they would be kept from doing so by the state full crew laws. The statement reads in pertinent part:

> "1. A study made by the carriers indicates that 25.9 percent of the firemen positions in freight and yard service must be maintained because of the provisions of so-called full-crew laws of the States of Arizona, Arkansas, Indiana, Louisiana, Nebraska, Nevada, New York, North Dakota, Ohio, Oregon, Texas, Washington, and Wisconsin; and that approximately 50 percent of the redundant positions occupied by unneeded trainmen and switchmen

> are protected by the laws of these States and those of California, Maine, and Mississippi. In these States, even when redundant employees are removed from the working lists through natural attrition, new unneeded employees must be hired to fill their positions * * *"

Thus not even the carriers themselves were contending that the adoption of Senate Joint Resolution 102 upon which Public Law 88-108 was based, would result in preemption of the state full crew laws.

IV. The Arbitration Board Created Under Public Law 88-108 Specifically Disclaimed Any Attempt to Supersede State Law

The position taken by the arbitration board in interpreting its own powers under Public Law 88-108 is worthy of considerable attention. Critical examination of the award itself does not indicate any purpose on the part of the board to affect state laws providing for the manning of locomotives or trains. The board was directed by statute to provide a solution to a labor dispute involving specific parties, and as to certain specific issues, i.e. those raised by conflicting notices on crew consist. Its attention was confined to these issues as between these parties, and there was no suggestion that state full crew laws were to be affected in one way or another.

It is clear that the board was dealing only with the demands of rules and practices established by agreement and custom, and not with the requirements of state full crew laws. This intent is demon-

strated in the opinion of the neutral members of the board with regard to the firemen issue in which the following appears:

> "On its face this procedure would seem to permit the individual carriers immediately to stop assigning firemen on ninety per cent of the freight engine crews and yard engine crews which they listed initially. That it would not have such an effect is due to three reasons. First, * * *. Second, a number of States, by law or administrative regulation, require the use of firemen in road freight or yard service. * * *" 41 LA 690.

On the train crew consist issue, the board very specifically stated that it was not formulating any national policy or rule. The court is respectfully referred to the following statements of the neutral members:

> "It is apparent to us that the consist of crews necessary to assure safety and to prevent undue work loads must be determined primarily by local conditions. A national prescription of crew size would be wholly unrealistic. Some yard service crews, for example, now consist of one foreman and one brakeman, while others consist of one foreman and as many as ten brakemen. The variation depends on a great complex of factors, reflected by the guidelines mentioned below. Though the range is less pronounced in road service, it also makes unfeasible a definite national rule.
>
> "* * *
>
> "Finally, although the most prevalent crew consist, in other than passenger service, is a conductor (foreman) and two brakemen (helpers), this fact provides the basis for only the most tentative generalizations. It does not justify a

national rule establishing this as the minimum consist ratio." 41 LA 694-695.

Relating to the same point, it must be noted that the board recognized its own limitations when it stated at 41 LA 680:

> "We are an arbitration board, established to settle two particular points of controversy in a specific labor dispute. Though our authority comes from congress, *the issues we must decide were framed by the parties, and the scope of our action cannot exceed the scope of the actions which the parties themselves might have taken with respect to these issues had they been able to reach agreement.* There are many questions of general social policy, community action, or legislation which bear on the problems before us, but they are not within our purview." (Emphasis supplied)

The importance of this language should not be underestimated. It is obvious that the parties to a labor dispute, whatever character the dispute might take, could not take action themselves to supersede state law. What the parties themselves could not do, the board was not constrained to do.

As pointed out with reference to the legislative history of Public Law 88-108, it was the function of the board to furnish an ad hoc settlement of particular points which had formed the subject matter of a dispute between certain railroads and operating employees. The answer was calculated to be temporary unless extended by mutual agreement of the parties. The board did not feel itself empowered to answer questions of "general social policy,

community action, or legislation" but left these items to the appropriate elements of government charged with the responsibility of weighing them.

V. There is No Irreconcilable Conflict Between Public Law 88-108 and State Full Crew Laws

The basic question on preemption is always congressional intent with respect to it. Preemption therefore may often be decided one way or the other from clear clues on such intent in the language of the federal act itself or from what the legislative history discloses. In the present case these two guides should prove sufficient.

Especially when such language and history are not revealing, it is necessary to resort to a third correlative criterion, that of direct or irreconcilable conflict between the federal and the state statutes. Consideration of irreconcilable conflict may not become necessary in a clear case, but the fact that the Arkansas U. S. District Court decision was rested largely upon it requires that this criterion be separately examined. Such a criterion must not be blown up into a principle of accidental or unintentional preemption. If Congress does not intend federal preemption, it will not occur.

The majority of the lower court felt that there was an "actual and an apparent conflict because of and demonstrated by the identity of the subject matter" (239 F. Supp. 1, 20) and "by the application and implementation of the state and federal

statutes which attempt to govern the same conduct". (239 F. Supp. 1, 24) Here, we respectfully submit, the main question was begged rather than examined. The specific claim that "none of the parties can comply with both the state law and the Arbitration Award" (239 F. Supp. 1, 24), only begs the question in another way. The lower court makes no further effort to demonstrate a conflict except in its references to a "national scheme of regulation" contained in Public Law 88-108 and to "the unambiguous national policy evidenced" in the statute. (239 F. Supp. 1, 26) One infers that the court believed that Congress had set up machinery which would inexorably determine whether firemen were to be employed and the number of trainmen to be employed on all types of trains and switching operations and in all states.

Sometimes the problem in determining whether there is irreconcilable conflict between national law and state law lies in determining to what each applies. This is the type of situation with which we here deal. There is no difficulty in knowing to what the Arkansas statute applies. It applies to the makeup and size of engine and train crews on certain freight trains operating in the State of Arkansas and to the makeup and size of switch crews within certain cities in Arkansas. We submit that the federal Arbitration Act, Public Law 88-108, and the Arbitration Award made pursuant to it do not apply to the operations of such freight train crews or such switch crews in Arkansas. Therefore there

is here no direct conflict between national law and the state law.

It is at times difficult to determine whether the national law and the state law apply to the very same subject matter, to the very same specific conduct or event. It was difficult in *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963). The majority thought the regulation of the federal Secretary of Agriculture did not apply to the distribution and sale of Florida avocados in California. The minority thought it applied to the marketing of Florida avocados in all states. The majority therefore found no irreconcilable conflict with a California statute which related to the sale of avocados in California, while the minority found the conflict to be present. The fact that "the California statute and the federal marketing orders embody different maturity tests" did not establish that there was an irreconcilable conflict. That, as the majority said, "poses rather than disposes of the problem before us". So in the present case, the fact that Public Law 88-108 has established a scheme resulting in an Arbitration Award relating to the use of firemen on freight trains and to road and yard train crew consist, which may eventuate in decisions or agreements on makeup and size of crews differing from the provisions of the Arkansas statute on these matters, only poses the problem.

The different conclusions reached by the majority and the minority in *Florida Avocado Growers*

on whether the federal marketing order applied to the marketing of Florida avocados in California turned essentially upon disagreement as to whether Congress gave the Secretary of Agriculture power to decide and whether he did in the exercise of that power determine that Florida avocados passing certain standards established by him could be marketed in California. How far did the Secretary's order reach? No farther, thought the majority, than to cover the picking, the processing and transportation of agricultural commodities; stopping short of distribution and sale to consumers. Marketing, the majority argued, is traditionally a subject of state control. The federal statute does not show a comprehensive congressional design with respect to retail distribution. It relates rather to temporary relief to growers suffering from adverse economic conditions, a problem allowing for widespread regional variations. Not so, said the minority, the federal order applies even to the ultimate marketing of the product to consumers. Congress intended a comprehensive and pervasive regulatory scheme on maturity and quality of agricultural commodities, establishing uniformity in quality standards, including uniformity at the market-end of the flow of commerce.

The basic question on conflict is similar in the present case. How far do the congressional statute and the Arbitration Award extend? Do they cover certain freight trains and other switching operations which are already regulated with respect to

crew makeup and number by local state safety statutes? Or do they apply only to railroad operations in states without full crew laws and to the operations in states with such laws which are not governed by such full crew statutes?

There is little difficulty in seeing that the federal statute and the award in the present case stop short of application to transactions covered by the state stautes which it is claimed are preempted. In the language of the cases, there is no identity of the subject matter to which both the federal regulation and the state regulation apply. Compliance with both is not a physical impossibility. The state statute applies to a phase of the general subject matter of railroad operations not reached by the federal law or the federal Arbitration Award. The majority found that both the federal and state regulations in *Florida Avocado Growers* might be observed and enforced even though some Florida avocados lacking 8% oil content would be stopped at the state line. In the present case any interstate train approaching Arkansas without a full crew stops at the line only to add enough men to come up to the state requirements.

The full purposes and objectives of Congress in the enactment of Public Law 88-108 did not encompass a determination as to whether firemen should or should not be employed on trains and switching operations subject to state law requirements on these matters in some states. Nor do the congressional

purposes and objectives encompass a determination of the proper size of train crews in operations as to which state laws already have spoken. This being so, the Arkansas full crew law does not stand as an obstacle to the accomplishment of the purposes and objectives of Congress.

To determine the soundness of the propositions just stated, one looks principally to the federal statute and to the legislative history. Previously these have been examined to see what light they throw directly on the question of congressional intent to supersede state law. Now, in this case relating to state laws in effect at the time of the congressional enactment, we reexamine the same two general areas to see whether Congress intended the federal statute and award to apply to the particular train operations and switching on which state laws on the need for firemen and on the size of train crews have already established rules.

Let us look first to the statute itself. Congress has established in the statute no uniform national plan on the need for firemen and on the number of trainmen. It has not spoken at all on the merits of these issues. Nor has Congress said that any such plan, if one such were to be devised by its creature board, is to apply to all railroads or to certain railroads in the country (including such of the operations of those carriers as are governed with respect to the hiring of firemen and size of train crews in some states by full crew laws). To the

contrary, Congress has sought only to provide for the settlement of the labor dispute between certain railroad carriers and their affected employees arising out of certain notices given by those carriers and by the unions representing certain of their employees. Because this particular dispute threatened essential transportation, Congress, as an emergency measure, forbade any strike or lockout arising out of it and set up an arbitration board consisting in the traditional fashion of equal numbers of employer and union representatives and additional members to be chosen by the ones first named or if there were no agreement by the President of the United States.

Nor is the Arbitration Board itself given any authority or power to establish a uniform and pervasive plan with respect to the employment of firemen and the size of train crews applicable to all or some railroads or to certain railroad operations (including those in some states which are governed as to these matters by full crew laws). The only authority delegated to it is the authority to make a *decision* on the disposition to be made of the issues made by the parties in their notices. Such issues could not encompass the repeal or amendment of state full crew laws. Just as the agreement of the parties could not have been in conflict with such state laws, so the decision of the board could not be. If it were it would be outside and beyond the issues made by the parties.

Does anyone seriously contend that Congress would delegate to an ad hoc temporary arbitration board of private citizens the power to establish a national policy uniformly applicable on matters of such importance as engine and train crew consists?

The award was not described in the statute in vague or general terms. It was spoken of in specific and limited fashion as constituting a complete and final disposition of "the aforesaid issues" made by the parties in their notices.

This statute shows no determination by Congress that there was a need for national uniformity on the use of firemen or on the number of men in train crews. The board was merely to make an arbitrator's decision on the issues, not to make a uniform rule. The decision was required to incorporate any matters on which the parties were in agreement.

There are also reasons constituting general noticeable knowledge tending to show that the federal statute does not establish nor provide for establishment of a uniform national policy on all operations of all carriers. The general subject of engine and train crew consist is not one which has ever had federal supervision. It is one which has always been regarded as properly of local concern. There is nothing in the essential nature of the problem demanding or admitting only of national supervision. Indeed, the history of this dispute and of this legislation shows neither the parties concerned,

nor the executive, nor the legislative authority to be even requesting exclusive and pervasive uniform federal regulation.

The statute contains other indicia that no comprehensive uniform federal regulation was contemplated. The statute itself was temporary. Its life has long ago expired. The statute limited the force of the award to a two-year period, absent other agreement of the parties.

The legislative history tells the same story as the words of the statute on the intent as to covering the same subject matter as state full crew laws in such a way as to produce a direct and irreconcilable conflict. The Senate report on the resolution (Senate Report No. 459) described its subject matter as a one-shot solution of a particular labor dispute imperiling the economy and security of the Nation. It said that the Act was not a precedent for the railroad industry or for any other labor dispute. It stated that the Senate Committee had imposed the two-year limit on the effect of the award "in order to closely limit the scope and impact of the resolution". A paragraph of House Report No. 713 deals with "NONPRECEDENTIAL EFFECT OF LEGISLATION".

The understanding of the Arbitration Board that it was not establishing any rule or procedure which would apply to operation subject to full crew laws has been elaborated in an earlier portion of this brief.

In *Florida Avocado Growers* the regulations issued by the Secretary of Agriculture relating to the dates of packing and shipping and the sizes of avocados grown in Southern Florida definitely settled the tests of maturity of such avocados. The making by the Secretary of such regulations as to quality and maturity of agricultural products was expressly authorized in the federal statute. In the present case the award merely gives the individual carrier parties "the right" to give the unions a list of the engine crews which in the carrier's judgment do not require the services of a fireman. It is entirely up to the carrier whether it wishes to give a list. Its judgment on what it puts on the list is discretionary.

On the union side also, what happens next under the award depends upon the action or inaction of particular persons who merely have the right to designate as requiring firemen 10% of the crews listed by the carrier. Even then the carriers may use firemen on the undesignated crews if they wish. The award nowhere prohibits carriers from using firemen.

On the train crew consist issue, the award establishes nothing at all in the way of a national rule or national practice. Essentially it simply remands the issue to local negotiation. Local negotiation will never occur, however, unless requested by a party. Again, special arbitration boards of adjustment are not set up except upon demand.

The group of private citizens who have played any governmental role which may be present in this plan have not provided any definite rule. There is no attempt here to establish a federally sanctioned uniform or pervasive plan on the need for firemen or on the size of train crews. The only thing provided is the possibility of rules for each carrier party to the dispute.

We submit that there is no irreconcilable conflict between the federal statute and award and the state law.

CONCLUSION

The State of Washington enacted its full crew laws in 1911. Since that time these laws have been successfully administered in the interest of the public safety. The legislature of this state is not presumed to act arbitrarily, nor is the Congress of the United States. Can it be, then, that Congress can be presumed to have accidentally preempted long standing state law by the enactment of temporary, stop-gap legislation creating a board of limited existence and powers, and leave thereby a gaping chasm where once existed traditional and long-established police regulation?

We have demonstrated in the course of this brief that Congress disclaimed any such intent in the legislative history of Public Law 88-108. The arbitration board similarily disclaimed any such power, and even the railroads, in their testimony be-

fore Congress on the resolution upon which Public Law 88-103 was predicated, admitted that it would have no preemptive effect. We have further demonstrated that there is no conflict between state and federal law upon which supersession of state law can be justified.

The pendency of a similar action in the Federal courts in the State of Washington makes the issue now before the court one vital to the interest of the people of this state. We urge that this court reverse the decision of the Arkansas court, and applying the principles set forth in the long line of cases herein cited, uphold the authority of the states to regulate in the interest of the safety of all its citizens.

Respectfully submitted,

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